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No. _____

In the

Supreme Court of the United States

OCTOBER TERM, 1997

DELOS M. PALMER, JR., *Petitioner*,
v.
RICHARD G. LaVALLEY and
GERARD ASSOCIATES, INC., *Respondents*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Nearly all the states have adopted procedures by which federal courts may certify questions of state law to the highest state courts for decision, a development this Court has repeatedly favored. *See*, e.g., *Arizonans for Official English v. Arizona*, 117 S. Ct. 1055 (1997). In *Lehman Bros. v. Schein*, 416 U.S. 386, 390-91 (1974), this Court held that use of certification in a given case "rests in the sound discretion of the federal court." Since *Lehman Bros.*, the lower federal courts have applied widely varying, inconsistent, and conflicting tests in deciding whether to certify questions of controlling state law to the state courts in particular cases. The court of appeals below did not certify to the state supreme court even a question that the appeals court found was controlling but undecided under state law, although both parties separately asked it to do so. The question presented is:

Whether this Court should now establish guidelines to govern when the federal courts should certify issues of state law to state high courts.

PARTIES TO THE PROCEEDINGS

Petitioner Delos M. Palmer was the plaintiff-appellee and cross-appellant in the court of appeals. Richard G. LaValley and Gerard Associates, Inc. were defendants-appellants and cross-appellees below and are respondents in this proceeding. All are listed in the caption here.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Delos M. Palmer, Jr., respectfully requests this Court to grant a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App.A, *infra*, 1a-15a) is reported at 107 F.3d 415. The order denying the petition for rehearing and suggestion for rehearing *en banc* (App. B, *infra*, 16a-17a) is not reported. The decision by the Sixth Circuit's motions panel, referring to the merits panel the respondents' motion to certify a question to the Ohio Supreme Court (App. C, *infra*, 18a-19a), is also unreported.

The jury verdict and special interrogatories are reproduced at App. D, *infra*, 20a-30a; they are unreported. The opinion of the district court ruling on the parties' post-trial motions (App. E, *infra*, 31a-37a) is also not reported.

JURISDICTION

The court of appeals entered judgment on February 20, 1997 and denied petitioners' timely request for rehearing, with suggestion for rehearing *en banc*, on April 7, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. sec. 1254(1).

RULE INVOLVED

Ohio Supreme Court Rule XVIII[1], section 1

> The Supreme Court may answer a question of law certified to it by a court of the United States. This rule may be invoked when the certifying court, in a proceeding before it, determines there is a question of Ohio law that may be determinative of the proceeding and for which there is no controlling precedent in the decisions of this Supreme Court, and issues a certification order.

STATEMENT

This case arises out of misappropriations of corporate opportunities and attorney malpractice committed by respondent LaValley. Beginning in about 1961, LaValley represented petitioner Delos M. Palmer, Jr. in numerous personal, family, and closely-held corporate business and legal matters. (TR 832-41) In 1983, Palmer, at LaValley's invitation, invested with LaValley and some of LaValley's other clients in a new, closely-held corporation, Fox Research, Inc. (Ex. 1-1; TR 594-95) Fox Research would own and provide money to develop computer software. LaValley was to be chairman, a director, a shareholder, and attorney to Fox Research. (*Id.*)

LaValley controlled the operations of Fox Research. He was the chairman and sole manager of the company, and he routinely acted without the approval or knowledge of Fox Research's other shareholders or even its other direc-

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[1] This rule was numbered XVI until June 1, 1994. The Sixth Circuit Court referred to it by its old number, infra, p. 19a.

tors and officers. (TR 1029-42, 1176-77, 1181-87) In fact, prior to 1992, LaValley called only one shareholder meeting for Fox Research, although he created false minutes of alleged meetings for a 1986 federal tax audit. (TR 398, 415-16, 429, 879-80, 885, 892)

By late 1984, Fox Research had developed FoxBASE, a software computer program that had modest sales thereafter. (Ex. 7-2; TR 154, 242) By mid-1985, the software developer who had created FoxBASE, and who was the President of Fox Research and a client and business partner of LaValley, saw an opportunity to make an improved version of FoxBASE, later called FoxBASE-Plus. (TR 252-54) LaValley agreed that the developer could himself own the -Plus program rather than offering it to Fox Research. (Ex. 2-5; TR 255-59, 643-49) When the developer needed $50,000 in outside funding in 1986 to complete Fox BASE-Plus, LaValley provided the funds through his own company, respondent Gerard Associates, Inc., in return for a half interest in the program. (Ex. 2-9 TR 1679-80) LaValley did not offer that opportunity to Fox Research, which had the money from the original $330,000 investment to provide the necessary funding. (*see* Ex. 8-2, pp. 9, 12, 18) LaValley and the developer later formed Fox Holdings, Inc., to own the FoxBASE-Plus and later programs. (Ex. 2-14)

FoxBASE-Plus was written by copying source code, organization, file names and the like from FoxBASE, as were two more related downstream improvement programs, FoxBASE-Plus/Mac and FoxPRO. (TR 316, 340, 344) All were opportunities that Fox Research could have funded in the line of its business, but the programs were not offered to it. (TR 1029-42) FoxBASE had some sales success, but not nearly so much as the later Fox programs derived from it:

while FoxBASE had about $1 million in sales through 1991, the other Fox programs had sales of about $113 million through June 1992. (Ex. 7-2 or 14-2)

By 1992, the success of the Fox programs had caught Microsoft's attention. (TR 1350-55) For stock valued at $160 million, Microsoft arranged a merger with Fox Holdings. (*Id.*) In its due diligence examination, Microsoft identified the adverse interests of Fox Research and required that LaValley clear up those interests before the merger could occur. (TR 1362)

Over Palmer's dissent, LaValley convinced the five other shareholders of Fox Research to approve a license of all of its rights in Fox software programs to Fox Holdings. (Ex. 1-40) The total payment was $900,000, or $100,000 per shareholder interest. (Ex. 14-3) In addition, LaValley convinced the other shareholders to settle individually with him and his companies for an additional payment of $400,000 per shareholder. (Ex. 1-39)

Palmer, by then a Florida resident, filed the present diversity case in Ohio in 1992, asserting four counts both individually and derivatively (Verified Complaint). His derivative claims were dismissed on motion in view of the individual settlements by the others. Palmer's individual claims were tried in 1994, and the jury found in his favor, awarding $22 million. (App. D, *infra*, 20a) In a series of special interrogatories, the jury found specifically that LaValley had both corporate and attorney duties to Palmer, breached them maliciously, and damaged him personally. (*Id.*, 22a-30a) On post-trial motions, the district court reduced the damage award to $13.7 million. (App. E, *infra*, 34a-37a)

LaValley appealed. Before briefing, he asked the Sixth Circuit to certify to the Ohio Supreme Court a question concerning whether a shareholder must prove a separate and distinct injury to himself to obtain relief from a *controlling*[2] shareholder for taking a corporate opportunity. In response, Palmer suggested that the question was inapt and that Ohio law was reasonably clear. As an alternative, Palmer proposed certifying a question concerning the jury instruction regarding the duties owed by a controlling shareholder of a closely-held corporation. A Sixth Circuit motions panel referred the certification issue to the merits panel. App. C, *infra*, 18a-19a.

The Sixth Circuit ultimately reversed the jury's verdict based on its reading of Ohio law. Acknowledging that "[t]he Ohio Supreme Court has not addressed the issue of direct versus derivative actions in the circumstances presented in the case before us," (App. A, *infra*, 11a) the court nonetheless held that Palmer could not recover individually because his claims and/or his proofs, both corporate and attorney malpractice, were "wholly derivative" of the injury to the corporation. (*Id.*, 11a-12a, 14a) The court recognized that at least one intermediate Ohio decision permitted recovery of similar damages against a controlling minority shareholder of a closely-held corporation, *McLaughlin v. Beeghly*, 617 N.E.2d. 703, 705-06 (Ohio App. 1992), but said it was not convinced "that the Ohio Supreme Court would extend *McLaughlin* to this case." App. A, *infra*, 12a.

With respect to Palmer's legal malpractice claim against LaValley, the court of appeals concluded similarly

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[2] LaValley's admission that he was a *controlling shareholder* of Fox Research was ignored by the appeals court.

that Palmer's damages were derivative of the losses suffered by the corporation and that LaValley as a matter of law had acted as counsel for the corporation, not as Palmer's lawyer (*Id.* at 13a-14a), despite the specific jury findings to the contrary. (App. A, *infra*, 7a; App. D, *infra*, 28a-29a).

The court did not mention the parties' requests for certification of state law questions to the Ohio Supreme Court.

In his petition for rehearing, Palmer asked the court of appeals to certify to the Ohio Supreme Court two questions. One pertained to the damages that a shareholder may recover individually from breaches of fiduciary duty to him in a closely held corporation. The second was whether a client may recover from his attorney the diminished value of his investment in a closely held corporation, where the diminution in value was caused by the attorney's malpractice. The court denied rehearing, without commenting on these or the parties' earlier certification requests. (App. B, *infra*, 16a-17a)

REASONS FOR GRANTING THE PETITION

I. THIS COURT SHOULD ESTABLISH GUIDELINES TO REMEDY THE CONFUSION AMONG THE LOWER COURTS AS TO WHEN A FEDERAL COURT SHOULD CERTIFY A QUESTION OF STATE LAW TO A STATE'S HIGHEST COURT

The determination of state law by a federal court is one of the most delicate but frequently recurring problems in our system of federalism. Under *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), the federal courts assumed "a greater responsibility for determining and applying state laws in all cases within their jurisdiction in which federal law does not govern." *Meredith v. Winter Haven*, 320 U.S. 228, 237 (1943).

Thus, federal courts considering state law issues must endeavor to place themselves in the shoes of the state courts and predict how those courts would resolve often difficult and unsettled issues of state law. But because the so-called "*Erie*-guesses" of the federal courts are not binding on the state courts, substantial disruption, uncertainty, and unfairness occur where a federal ruling is wrong, or where it is ultimately rejected in another case by the state courts.

Certainly, the ordinary grist of the diversity mill poses no great difficulty for federal courts. Even where the highest court of a state has not addressed an issue, a federal court often will find a clear path to its decision by examining other relevant sources of state law, including the decisions and considered dicta of intermediate state appellate courts

and the plain language of state statutes. *Jefferson v. Lead Indus. Ass'n*, 106 F.3d 1245, 1247 (5th Cir. 1997). Yet, in undertaking the task of, for example, "determin[ing] what the New York courts would think the California courts would think on an issue about which neither has thought," *Nolan v. Transocean Air Lines*, 276 F.2d 280, 281 (2d Cir. 1960) (Friendly, J.), *set aside by* 365 U.S. 293, 296 (1961), occasions inevitably and not infrequently occur in which substantial uncertainty over important state law persists.

In recent decades, nearly all of the states have developed a mechanism for assisting a federal court which, after resorting to the usual sources of judicial decision making, finds itself having to make an "*Erie*-guess" that is almost wholly speculative. Rather than force federal courts so to speculate as to the proper construction of state law, these states have enacted procedures for certifying questions of law from federal courts to the highest state courts.

Unfortunately, the federal courts have made only haphazard and inconsistent use of certification procedures. As we show here, the courts of appeals have applied widely divergent standards in deciding whether to certify state law issues to state high courts. As a result, whether a particular state law question is certified turns largely on which circuit (and which panel) happens to be considering the issue, rather than on any principled consideration of the question. This is unacceptable in a system in which the result should not depend on the forum in which a case is filed.

In short, nearly a quarter of a century after this Court's ringing endorsement of certification in *Lehman Bros. v. Schein*, 416 U.S. 386 (1974), the federal courts show no sign of reaching a consensus on the circumstances

in which certification is appropriate. This Court's specific guidance now is very much needed.

A. This Court Has Enthusiastically Endorsed Certification, But It Has Not Articulated Clear Standards Governing When Federal Courts Should Avail Themselves Of This Important Mechanism

In *Lehman Bros.*, this Court "spoke glowingly of certification," providing "[n]ew impetus * * * to the adoption of certification procedures, and to the use of them where they exist." 17A C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure, § 4248, at 158, 164 (1988).[3] In holding that certification could be used even in a diversity case that raised no constitutional issue, the *Lehman Bros.* Court observed that certification "does, of course, in the long run save time, energy, and resources and helps build a cooperative judicial federalism," and that it is "particularly appropriate" for state law questions that are "novel[]" and "unsettle[d]." 416 U.S. at 391.

Since *Lehman*, this Court repeatedly has endorsed the virtues of certifying novel questions of state law to the highest state courts for authoritative determination. In *Elkins v. Moreno*, 435 U.S. 647, 662 n.16 (1978), this Court certified a question, sua sponte, noting that,

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[3] Of the forty-five jurisdictions that had certification procedures at recent count, thirty-one of them adopted such procedures since the *Lehman Bros.* decision. M. Bryan Schneider, "*But Answer Came There None": The Michigan Supreme Court and the Certified Question of State Law*, 41 Wayne L. Rev. 273, 293 (1995).

> In a federal system, it is obviously desirable [for important state law issues to] be decided in the first instance by state courts. * * * [W]here as here there is an efficient method for obtaining a ruling from the highest court of a state we do not hesitate to avail ourselves of it.

Similarly, in *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 510 (1985), Justice O'Connor wrote in her concurring opinion that:

> Speculation by a federal court about the meaning of a state statute in the absence of a prior state court adjudication is particularly gratuitous when * * * the state courts stand willing to address questions of state law on certification from a federal court.

Most recently, in *Arizonans for Official English v. Arizona*, *supra*, 117 S. Ct. 1055 (1997), this Court reiterated its long-standing view that

> Certification procedure * * * allows a federal court faced with a novel state-law question to put the question directly to the State's highest court, reducing the delay, cutting the cost, and increasing the assurances of gaining an authoritative response.
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> * * *
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> Taking advantage of certification made available by a State may "greatly simplify" an ultimate adjudication in federal court.

Id. at 1073-75. Certification also eliminates the risk of "friction-generating error," which often results when a federal court rules on state law issues "not yet reviewed by the State's highest court." *Id.*, at 1074.

This Court's pronouncements have clearly and consistently articulated the view that certification preserves federalism, retains respect for both the state and federal courts, and increases the utility of the diversity jurisdiction of the federal courts. What is far less clear, however, is when the federal courts should avail themselves of this helpful clarification mechanism.

This Court has never established comprehensive guidelines to govern federal courts' use of state law certification procedures. Indeed, the Court has scarcely offered any guidance at all on this important question. Nearly a quarter century ago, in *Lehman Bros.*, the Court declined to

> suggest that where there is doubt as to local law and where the certification procedure is available, resort to it is obligatory. * * * Its use in a given case rests in the sound discretion of the federal court.

416 U.S. at 390-91. This formulation has not changed or been seriously revisited since 1974. The only further inkling of this Court's inclinations appeared earlier this year in *Arizonans For Official English*, in which the Court rejected the Ninth Circuit's effort to avoid certification by imposing a "unique circumstances" requirement as a prerequisite. As Justice Ginsburg wrote for the Court,

> Novel, unsettled questions of state law, however, not `unique circumstances,' are necessary

> before federal courts may avail themselves of state certification procedures."

117 S. Ct. at 1074-75.

Notwithstanding this Court's recent statement that "novel, unsettled questions of state law" are necessary for certification, and that "unique circumstances" are not, a compelling need exists for this Court now to set forth a uniform federal standard. In so doing, this Court would override the disparate and conflicting criteria currently applied among (and even within) the courts of appeals, thereby eliminating the fundamental unfairness to litigants and harm to federalism that occurs when a question of state law is answered differently depending on the federal circuit in which it is brought.

B. In The Absence Of Guidance From This Court, The Courts Of Appeals Have Employed Diverse And Conflicting Approaches To Certification

1. At present, the circuit courts of appeals employ a wide range of general approaches and specific criteria for determining whether to certify a question of state law.

Some courts have adopted a hesitant approach to certification. For example, after championing the certification process for years,[4] the Fifth Circuit has grown increas-

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[4] *See, e.g., Boardman v. United Services Auto Ass=n*, 742 F.2d 847, 848 n.1, 851 (5th Cir. 1984). *See also* John R. Brown, *Fifth Circuit Certification – Federalism in Action*, 7 Cumb.L.Rev. 455, 485 (1977) ("In our vaunted federal-state structure, the states are supreme (short of constitutional factors) in their own field. The interests of the state are advanced by giving the state an opportunity authoritatively to

ingly "chary about certifying questions of law absent a compelling reason to do so" because "the availability of certification is such an important resource to this court that we will not risk its continued availability by going to that well too often." *Jefferson*, 106 F.3d at 1247. Similarly, the First Circuit has stated its "reluctan[ce] to burden the Court with certification, and the litigants with the attendant delay," but has certified questions "of sufficient and prospective importance to state policy" anyway, not wishing to "make a far-reaching decision without advice." *Pyle v. South Hadley Sch. Comm.*, 55 F.3d 20, 21 (1st Cir. 1995).

By contrast, the Eleventh Circuit — applying the most liberal standard for certification — has repeatedly held that "[w]here there is *any doubt* as to the application of state law, a federal court should certify the question to the state supreme court to avoid making unnecessary *Erie* 'guesses' and to offer the state court the opportunity to interpret or change existing law." *Colonial Properties, Inc. v. Vogue Cleaners, Inc.*, 77 F.3d 384, 387 (11th Cir. 1996) (emphasis added) (quoting *Mosher v. Speedstar Div. of MCA Int'l Inc.*, 52 F.3d 913, 916-17 (11th Cir. 1995)).

The Sixth Circuit, on occasion, has also warmly endorsed certification:

> We believe that judicious resort to the technique of certification in situations * * * where an important question of state law has arisen solely in federal court, prevents federal invasion of the state law-making function and avoids needless federal-state friction. Indeed, the Supreme

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declare its own law, in light of important underlying state policies.")

> Court has recommended that we use certification to address the problem of authoritatively determining unresolved state law involved in federal litigation. By certifying the * * * question before us today, we not only avoid the hazards of attempting to forecast how Michigan courts might rule, but we also afford the Supreme Court of Michigan the opportunity to address a not insubstantial issue under the law of that State. Certification also saves time, energy, and resources and helps build a cooperative judicial federalism.

Geib v. Amoco Oil Co., 29 F.3d 1050, 1060-61 (6th Cir. 1994) (internal quotations and citations omitted). However, in the present case, the merits panel silently declined to certify any question, without explanation, although it conceded that the controlling state law issues were unsettled. App. C, *infra*, 19a; *see* App. A, *infra*, 11a-12a.

2. Because of their radically different philosophies toward certification, the courts of appeals apply dramatically different tests in deciding whether to certify. Some courts and judges have generated extensive compilations of the myriad factors that may be considered in deciding whether to certify a question to state supreme courts. *See, e.g.*,

- *Smith v. Johnson Propeller Co., Inc.*, 91 F.3d 166 (Table), 1996 WL 202674, at *9 (Fed. Cir. Apr. 24, 1996) (Smith, J., dissenting) (compiling "[a]n inexhaustive list" of twelve "overlapping factors that federal courts consider regarding certification"); and

- *L. Cohen & Co., Inc. v. Dun & Bradstreet, Inc.*, 629 F. Supp. 1419, 1423-24 (D. Conn. 1986) (Cabranes, J.) (listing six factors that a federal judge might appropriately consider in deciding whether to certify a particular issue to a state supreme court). [5]

In stark contrast, the Eleventh Circuit, as noted earlier, applies an exceedingly simple test: it will certify whenever it has "any doubt" about state law. *Colonial Properties*, 77 F.3d at 387.

Several circuit courts, however, have staked out a sensible middle ground position. Their straightforward articulation of the standard for certification — apparently followed by the Third, Seventh, Ninth, Tenth, and District of Columbia Circuits — consists of just two parts: (1) the question must be "controlling" of the federal case, and (2) no "controlling precedent" or "clear guidance" can be found in existing state court decisions. *See, e.g.*,

- *Konstantopoulos v. Westvaco Corp.*, 112 F.3d 710, 722 (3d Cir. 1997) ("Because we found no decision of the Supreme Court of Delaware that definitively addressed

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[5] *See also, e.g., State of Florida ex rel. Shevin v. Exxon Corp.*, 526 F.2d 266, 274-75 (5th Cir. 1976). ("In determining whether to exercise our discretion in favor of certification, we consider many factors. The most important are the closeness of the question and the existence of sufficient sources of state law — statutes, judicial decisions, attorney general's opinions — to allow a principled rather than a conjectural conclusion. But also to be considered is the degree to which considerations of comity are relevant in light of the particular issue and case to be decided. And we must also take into account practical limitations of the certification process: significant delay and possible inability to frame the issue so as to produce a helpful response on the part of the state court.")

the state-law issues raised in this appeal, we certified two questions of state law to that court");

- *Shirley v. Gerald R. Russell Trucking, Inc.*, 69 F.3d 839, 843-44 (7th Cir. 1995) (certifying state law question to Indiana Supreme Court where question "has not been addressed by either the state's own courts or federal courts" and "will control the outcome of the case");

- *Moreno v. Gonzalez*, --- F.3d ---, 1997 WL 333325, at *3 (9th Cir. Jun. 19, 1997) (certifying "important question of state law" to Arizona Supreme Court based on findings that "questions of state law may be determinative of the claims currently pending in this court" and "there is no controlling precedent in the decisions of the Arizona Supreme Court or in the Arizona Court of Appeals");

- *OMI Holdings, Inc. v. Howell*, 107 F.3d 21 (Table), 1997 WL 60687 (10th Cir. Feb. 13, 1997) (unpublished disposition) ("We concluded that certification was proper because there was no controlling Kansas case law and the Kansas Supreme Court's disposition of the questions submitted would 'clearly control the outcome of the case'");

- *East v. Graphic Arts Industry Joint Pension Trust*, 107 F.3d 911, 911 (D.C. Cir. 1997) (certifying question of District of Columbia law that "will control the disposition of the pending appeal" and upon which "there is no controlling precedent").

We note, however, the lack of uniformity even within circuits in regard to the standards (or lack thereof) applied to certification questions. While the Ninth Circuit

has applied the most common two-part test in some cases, it has also inexplicably attempted – until rebuffed by this Court — to engraft a further requirement that "unique circumstances" be shown to justify certification in a case of great state (and national) importance. *See Yniguez v. Arizonans For Official English*, 69 F.3d 920, 931 (9th Cir. 1995) (en banc), *vacated and remanded sub nom. Arizonans For Official English v. Arizona*, 117 S. Ct. 1055 (1997).

Further, as this case demonstrates, the Sixth Circuit also has been demonstrably uneven in handling certification issues. On the one hand, as noted above, the Sixth Circuit has extolled the virtues of "avoid[ing] the hazards of attempting to forecast how [state] courts might rule" and "afford[ing] the [state supreme court] the opportunity to address a not insubstantial issue under the law of that State." *Geib*, 29 F.3d at 1060-61. On the other hand, in this case, the Sixth Circuit ignored without so much as a single comment petitioner's request for certification of an issue that the court had *already* conceded had not been addressed by the Ohio Supreme Court. ("The Ohio Supreme Court has not addressed the issue of direct versus derivative actions in the circumstances presented by the case before us." App. A, *infra*, 11a.) App. B, *infra*, 17a.

We submit that the recognized two-part test best balances the competing interests of uniformity across the circuits and flexibility to deal with each case and the legal situation in each state on its own facts and circumstances. If adopted by this Court, this test would establish a consistent framework for examining certification issues — raised either by the parties or by the federal courts themselves — and also a threshold test for requiring certification or not. In short, any issue of state law that does not meet these two

minimum criteria would not be certifiable, but any issue that does usually should be certified. (The Court could also decide whether to permit the lower federal courts to apply additional factors – such as those set forth in the cases cited, *supra* pp. 15-17.)

Furthermore, apart from achieving a sound balance of policy interests, this two-part test has the added virtue of closely tracking the standard most frequently set forth in the corresponding state certification statutes. The Uniform Certification of Questions of Law Act, which has been adopted in whole or in part in at least twenty-six states, sets forth "two important elements must be satisfied" for certification: (1) it must appear that "there are no controlling precedents" in state case law and (2) the question must be one that "may be determinative of the cause then pending." *See* Note, Jack J. Rose, *Erie R.R. and State Power to Control State Law: Switching Tracks to New Certification of Questions of Law Procedures*, 18 Hofstra L. Rev. 421, 427-28 (1989); *see also Arizonans For Official English*, 117 S. Ct. at 1075 n.31 (noting that Arizona "permits certification to the State's highest court of matters 'which may be determinative of the cause," and as to which 'no controlling precedent' is apparent to the certifying court"); Ohio S.Ct. Rule XVIII (establishing the same two-part test). Applying the same standards on both sides of the certification equation will maximize the likelihood that the federal and state courts will agree as to which questions of state law should be transmitted to the state courts and then be answered by them.

After 23 years of experience under the "sound discretion" regime announced in *Lehman Bros.* — a period in which the availability of certification has expanded to encompass almost all of the states — the time has come for

this Court to put an end to the disparate, conflicting, and open-ended standards (or lack of standards altogether) currently applied to certification in the various courts of appeals. This case presents a suitable vehicle for undertaking this needed enterprise. Petitioner raises important questions of state law upon which, as the Sixth Circuit itself recognized, there is no controlling precedent in Ohio supreme court case law. In addition, should petitioner prevail on this issue in the Ohio Supreme Court, his entire, multi-million dollar judgment would be restored.

Petitioner would have been entitled to certification of his question under the two-part test suggested preliminarily here and now followed by many of the other circuits. Petitioner should not be deprived of his opportunity for certification to the Ohio Supreme Court simply because his appeal was considered by the Sixth Circuit instead of by one of the five other circuits that uses the dominant two-part test.

C. The Sixth Circuit Should Have Certified The State Law Questions In This Case

Both sides below timely but separately requested certification to the Ohio Supreme Court of the various questions relating to the corporate fiduciary duty issue in a close corporation. Prior to briefing of the appeal, the court of appeals declined to certify respondent's proposed question and petitioner's alternative question, referring the matter to the merits panel. App. C, *infra*, 19a. After the decision on the appeal, Palmer moved for reconsideration and for certification of two questions to the state supreme court; his request was denied without comment.

1. The Controlling State Law Questions Should Have Been Certified to the Ohio Supreme Court

Upon reaching the merits, the court noted that "[t]he Ohio Supreme Court has not addressed the issue of direct versus derivative action in the circumstances presented by the case before us." *Id.* at 12a. Nevertheless, the court of appeals decided this novel and unsettled question, reversing the judgment of the district court and the jury verdict and findings based upon its own reading (or misreading) of Ohio law. *Id.* at 12a-13a.

Even when its apparent mistakes of state law were pointed out in the petition for rehearing, again seeking certification, the court once more silently declined (without explanation) to obtain the assistance of the Ohio Supreme Court. App. B, *infra*, at 16a-17a.

Because of the court's silence as to its exercise of discretion under *Lehman Bros.*, we do not know what test, if any, it applied in deciding to resolve itself the state law issues without certification to the Ohio Supreme Court. What we do know, however, is that petitioner would have been entitled to certification of the questions presented in his rehearing petition under the two-part test followed in many other circuits. Those questions were dispositive of the claims that went to the jury and, by the court of appeals' own estimation, raised an important and unsettled question of state law.

Indeed, the weight of Ohio authority suggests that the jury's verdict would have been upheld had the court of appeals permitted the Ohio Supreme Court to make an

authoritative ruling in place of the guesswork engaged in by the Sixth Circuit. Most significantly, the decision below conflicts with the expansive language of the Ohio Supreme Court in *Crosby v. Beam*, 548 N.E.2d 217, 218, 221 (Ohio 1989).

In *Crosby*,the Ohio Court spoke broadly as to who could be a defendant in a fiduciary duty action brought individually by a minority shareholder in a closely-held corporation. In particular, the court made several references to the fiduciary duties of (and breaches thereof by) "majority *or* controlling shareholders" and stated that,

> '[a] court of equity will grant appropriate relief where the majority *or* dominant group of shareholders act in their own interest or in the interest of others so as to oppress the minority or commit fraud upon their rights.'

548 N.E.2d at 221 (emphases added) (citing *United States v. Byrum*, 408 U.S. 125, 137-38 fn 11 (1972)). The court continued,

> [m]ajority *or* controlling shareholders breach such fiduciary duty to minority shareholders when *control* of the close corporation is utilized to prevent the minority from having an equal opportunity in the corporation.

548 N.E.2d at 221 (emphases added). Palmer was such a minority shareholder here, and LaValley was a controlling shareholder, as he has admitted for instance in his motion papers seeking certification in the appeals court (*supra*, p. 5).

Significantly, Ohio appellate decisions after *Crosby* also have granted recovery to minority shareholders against shareholders and officers who controlled the company without having numeric majority ownership. *See, e.g.*,

- *Cousins v. Brownfield*, 615 N.E.2d 1064, 1069-70 (Ohio App. 1992) (defendant was an officer and director but owned no stock; held, he had fiduciary duties individually to plaintiff stockholder under *Crosby*, particularly where the other shareholders had abandoned their shares) (motion to certify the record to the Ohio Supreme Court denied, 610 N.E.2d 423 (1993)); and

- *Dencil Terry v. James M. Carney, Sr.*, 1995 Ohio App. Lexis 5754 (10.5% shareholder sued 40.8% shareholders, who were also officers and directors, individually for conspiracy to commit fraud by breaching fiduciary duties to the minority shareholders; dismissal for failure to state an individual claim reversed and case remanded, at *17-18).

With respect to the legal malpractice claims, the Sixth Circuit held that LaValley – who had been Palmer's attorney in personal, business, and family matters for over 20 years by 1983, when Fox Research was started – represented only Fox Research and not Palmer individually in connection with Palmer's investment in that company. *See* App. A, *infra*, 13a-14a. The court did not, however, cite a single case in support of its conclusion, much less any controlling Ohio case. While there is no Ohio decision directly on point, the existing Ohio precedent suggests that LaValley *did* represent Palmer individually, and thus that Palmer did have a valid malpractice claim under Ohio law. *See*, *Arpadi v. First MSP Corp.*, 628 N.E.2d 1335 (Ohio 1994) (in Ohio, an attorney for a partnership is also attorney for the partners

individually); and *Henry Filters, Inc. v. Peabody Barnes, Inc.*, 611 N.E.2d 873, 876 (Ohio App. 1992) (the "ultimate issue" in determining whether an attorney-client relationship existed "is whether the putative client reasonably believed that the relationship existed".). Had the Sixth Circuit certified the attorney malpractice issue to the Ohio Supreme Court, this uncertainty in Ohio law would have been resolved.

The decision below turns the law of professional responsibility on its head. It allows an attorney to injure his client yet escape liability – simply because the attorney put himself into multiple conflicts with that client and that client into conflict with others of his clients. The decision below re-establishes the ability of attorneys to do business with their clients with impunity, taking advantage of the trust that clients place in them to put the clients' interests first. Attorneys are allowed by this decision to subordinate their clients' interests to their own, without remedy by federal suit.

2. The Ohio Supreme Court Welcomes Certifications from the Federal Courts on Important State Law Questions

Had the court of appeals properly certified the dispositive questions below to the Ohio Supreme Court, an answer would surely have been forthcoming. Ohio strongly encourages certifications by the federal courts of controlling questions of state law. As the Ohio Supreme Court stated in *Scott v. Bank One Trust Co., N.A.*, 577 N.E.2d 1077 (Ohio 1991):

> If the federal court errs [in determining or applying state law], it applies law other than Ohio

> law, in derogation of the state's right to prescribe a "rule of decision." By allocating rights and duties incorrectly, the federal court both does an injustice to one or more parties, and frustrates the state's policy that would have allocated the rights and duties differently.
>
> * * * [W]e strongly believe in the importance of accurately applying Ohio law in federal courts. * * * To the extent that a federal court applies different legal rules than the state court would have, the state's sovereignty is diminished. * * *
>
> Certification ensures that federal courts will properly apply state law. * * * It thus strengthens the "federalist structure of joint sovereigns," * * * and redeems "the promise of liberty," * * * contained in the federal and Ohio Constitutions.

Id. at 580 (citations omitted).

Certification certainly will be accepted by the Ohio Supreme Court if now requested by this Court, or by the Sixth Circuit on remand.

II. CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APPENDIX A

Nos. 94-3994/4009
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DELOS M. PALMER,
Plaintiff-Appellee/
Cross-Appellant,

v.

FOX SOFTWARE, INC.; FOX HOLDINGS, INC.; RICHARD G. LAVALLEY, JR.; DAVID A. FULTON; FULTON ASSOCIATES, INC.,
Defendants,

RICHARD G. LAVALLEY, SR.; GERARD ASSOCIATES, INC.,
Defendants-Appellants/
Cross-Appellees.

ON APPEAL from the United States District Court for the Northern District of Ohio

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Decided and Filed February 20, 1997

Before: JONES, BOGGS, and BATCHELDER, Circuit Judges.

ALICE M. BATCHELDER, Circuit Judge: The plaintiff filed this diversity action in the United States District Court for the Northern District of Ohio. The jury found for the

plaintiff and awarded damages. Before us are numerous appeals and cross appeals. For the reasons that follow, we reverse the final judgment of the district court.

I. FACTS AND PROCEDURAL HISTORY

A. THE CAST

This action has three related "foxes": Fox Research, Inc., Fox Software, Inc., and Fox Holdings, Inc.

Fox Research was formed in 1983 by Defendant-Appellant Richard LaValley, Sr. ("LaValley"), who became chairman and a director. Plaintiff-Appellee Delos Palmer was one of nine original Fox Research investors, each of whom invested $25,000. In 1984, seven of the nine, including Palmer and LaValley invested an additional $15,000. LaValley subsequently acquired the interest of the remaining two of the nine investors, resulting in his having a 3/9 ownership interest. Defendant David Fulton was president of Fox Research. Fulton was not a shareholder in Fox Research.

Defendant-Appellant Gerard Associates, Inc., a management company that LaValley owns, became the tenth investor in Fox Research in 1984 and 1985, acquiring a 1/10 interest. As a result, Palmer's 1/9 interest became a 1/10 interest, and LaValley's 3/9 interest became a 3/10 interest. Other ownership interests in Fox Research diminished similarly.

Defendant Fox Software was a corporation that LaValley and Fulton owned. In 1992, Microsoft Corporation acquired Fox Software.

Fulton and his wife ran a software consulting firm, Dacor Computer Systems, Inc. Under a subcontract from Fox Software, Dacor wrote computer programs.

Fulton formed Fulton Associates in 1985 after selling his interest in Dacor to his wife as part of a divorce settlement.

In 1986, LaValley and Fulton formed defendant Fox Holdings as a joint venture between Gerard Associates and Fulton Associates. Fox Holdings developed programs called FoxBASE, FoxBASE+, FoxBASE/Mac, and FoxPro ("Fox Programs"), each subsequent version being an improvement over the previous one. When Microsoft acquired Fox Software, Fulton became a Microsoft vice president. He and his programming team from Fox Holdings moved to Seattle.

LaValley was a longtime lawyer to Palmer, Palmer's family, Fox Research, Fox Software, Fulton, Fulton Associates, Dacor, and Gerard Associates. He is the father of defendant Richard LaValley, Jr. ("LaValley, Jr."), also a lawyer.

B. THE COMPLAINT

Palmer filed this four-court action individually and derivatively, as a shareholder, on behalf of all of the shareholders of Fox Research, Inc., alleging that the defendants improperly took knowledge which Fox Research paid for and owned, and opportunities which Fox Research should have had, and used them to develop the Fox Programs under the ownership of Fox Holdings. According to the complaint, Fox Research was established to own and finance development of computer database software programs con-

ceived and developed by Fulton and marketed by Fox Software. Palmer alleges that LaValley promised the Fox Research shareholders, all of whom were clients of LaValley or his law firm, that they would have database software development opportunities beyond the initial application programs and FoxBASE. The complaint also alleges that LaValley and Fulton improperly increased their own interest in and control over Fox Research without presenting corporate opportunities, such as the additional 2/9 interest in Fox Research that LaValley acquired, to all shareholders, and that, without the approval of Fox Research shareholders, LaValley and Fulton made deals which harmed Fox Research yet benefited LaValley, Fulton, and the corporations which they owned and in which Palmer and all other Fox Research shareholders except LaValley had no interest. Finally, when Microsoft sought to buy out Fox Software, LaValley is alleged to have induced Fox Research shareholders, some of whom were still his or his law firm's clients and some of whom were not, to meet and to execute (1) an exclusive, irrevocable license of their right, title, and interest in FoxBASE software to Fox Holdings, which would enable the merger with Microsoft to proceed, and (2) a release from any claims to clarify, release, or ratify all acts of Fox Research *vis-à-vis* Fox Holdings, Fox Software, and their shareholders, officers, and directors.

Count I is a claim for misappropriation of corporate opportunities, and alleges breach of corporate fiduciary duties; Count II alleges unjust enrichment and constructive trust, and Count III alleges attorney malpractice. Palmer dismissed Count IV before trial.

C. TRIAL COURT PROCEEDINGS

Prior to trial, the district court granted partial summary judgment to the defendants on the "plaintiff's derivative claim."[1] The case then proceeded to trial on the remaining claims. Using a special-verdict form, the jury awarded Palmer $22 million in compensatory damages, which the district court later remitted to $13.7 million.

On Counts I and II, the jury found that neither LaValley nor Fulton "performed his duties in good faith and in the manner he reasonably believed to be in the best interests of Fox Research, Inc., and its shareholders . . . ." The jury was asked:

> Do you find that the material facts as to LaValley['s] relationship or interest and as to the contract or transaction were disclosed or were known to the shareholders and the contract or transaction was specifically approved at a meeting of the shareholders held for such purpose by a vote of the majority of the shareholders not interested in the contract or transaction?

The answer was "no."

After concluding that Fulton had engaged in self dealing, the jury was asked:

> Do you find that the material facts as to Fulton's relationship or interest and as to the contract or trans-

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[1] After reviewing the complaint, the motion for summary judgment, and the district court's memorandum and order, we conclude that, although the order might have been more clear, it dismissed each count of the complaint to the extent of the derivative claims contained therein.

> action were disclosed or were known to the shareholders and the contract or transaction was specifically approved at a meeting of the shareholders held for such purpose by a vote of the majority of the shareholders not interested in the contract or transaction?

Again, the answer was "no."

Moreover, the jury found that LaValley, as an officer, director, or controlling shareholder of Fox Research—and Fulton as an officer of Fox Research—"acquired knowledge and information about a possible investment or business opportunity in Fox Research's line of business, or advantageous to Fox Research[,]" an investment which Fox Research had the financial ability to make.

There were originally nine equal shareholders in Fox Research. LaValley bought out two, leaving seven shareholders altogether. LaValley originally had 3/9 of Fox Research, and the remaining six each had 1/9. The jury further found that Palmer—one of the six—was entitled to a 1/7, instead of a 1/9, interest in Fox Research.[2]

Also with respect to Counts I and II, the jury found that LaValley, as an officer, director or controlling shareholder did not keep correct and complete corporate books, records, and minutes; he knowingly made false entries with an intent to deceive; he did not hold legally required annual meetings of Fox Research; Fulton was obligated to assign copyrights to Fox Research; and the defendants fraudulently concealed their misconduct from Palmer. Although the jury found that Palmer had breached his duty as a Fox Research director to keep informed of corporate affairs with the care

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[2] The appellants do not challenge this finding.

of an ordinarily prudent person under similar circumstances, it did not find that Palmer knew or should have known of the injuries he claims and their cause by June 23, 1988, four years before he filed his complaint, a finding which was significant for the statute of limitations.

On Count III, the jury found that LaValley had an attorney-client relationship with Palmer *vis-à-vis* Fox Research,[3] and that LaValley breached a duty to provide competent legal services.

The jury found Palmer was damaged as a result of all of these actions. Finally, with respect to all three counts, the jury found that LaValley, Fulton, and LaValley, Jr., acted with malice toward Palmer. The jury added a handwritten note on the special-verdict form after each of the questions respecting malice that said, "Regarding extremely reckless behavior only."

The district court ordered judgment entered against LaValley, Fulton, Gerard Associates, and Fulton Associates, and dismissed with prejudice the action as against LaValley, Jr., apparently recognizing that the jury's finding that LaValley, Jr., acted with malice toward Palmer "[r]egarding extremely reckless behavior only" was inconsistent with its finding that LaValley, Jr., was not liable. Consistent with the settlement agreement that the plaintiff and Fulton had reached before trial, Fulton's liability, given the size of the verdict, was limited to $3 million.

After the trial, the district court summarily denied several motions by the defendants. Among them were a motion for judgment as a matter of law, and a motion for a

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[3] The jury found no such relationship between Palmer and LaValley, Jr.

new trial on the issue of damages, which the district court denied on the condition that the plaintiff accept a remittitur of $8,328,545, leaving a verdict in the amount of $13,671,455, which the district court calculated to be the maximum the jury could reasonably find to compensate the plaintiff for his loss. The plaintiff accepted the remittitur. The court also denied the plaintiff's motion to award him $88 million in punitive damages from LaValley, $22 million in punitive damages from Fulton, and $50,000 punitive damages from LaValley, Jr., and more than $1.7 million in attorneys' fees and expenses. Finally, the court denied the plaintiff's motion under FED. R. CIV. P. 59(e) to amend the judgment to add an award of $2.3 million in prejudgment interest.

Defendants LaValley and Gerard Associates timely appeal the final judgment, including the denial of their post-trial motions. Plaintiff Palmer cross-appeals the denial of pre-judgment interest, punitive damages and attorneys' fees.

II. DISCUSSION

A. STANDARD OF REVIEW

In a diversity action, a federal court applies state substantive law to state-law claims. *See Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938) (citing *Baltimore & O. R. Co. v. Baugh*, 149 U.S. 368, 401 (1893) (Field, J., dissenting)).

The appellants and plaintiff together present several issues for review. We consider first the appellants' contention that the district court erred in denying their motion for judgment as a matter of law. Since the appellants prevail on

that claim, we need not address the remaining issues raised on appeal.

We have recently held that a federal court sitting in diversity reviews *de novo* legal determinations raised by a Rule 50 motion, and must apply the forum state's standard of review "only when a Rule 50 challenge is mounted to the sufficiency of the evidence supporting a jury's findings. No deference is appropriate in diversity cases to the trial court's resolutions of legal questions." *K & T Enterprises, Inc. v. Zurich Ins. Co.*, 97 F.3d 171, 176 (6th Cir. 1996). Importantly, "it is clear that we need show no deference to the *trial court's* assessment of the sufficiency of the evidence before a jury, even if state law so requires." *Id.* To the extent that Appellant's Rule 50 motion is based on a challenge to the sufficiency of the evidence supporting the jury's verdict, we must look to the law of Ohio to determine the standard under which we review the motion. Ohio law requires that we construe the evidence most strongly in favor of the nonmovant. *See Sanek v. Duracote Corp.* 43 Ohio St. 3d 169, 172 539 N.E.2d 1114, 1117 (1989) (citations omitted).[4]

B. THE NATURE OF THE MISAPPROPRIATION CLAIMS

After the closing arguments at trial, the district court instructed the jury that Palmer could recover his *pro rata* share of any injury to the corporation. The appellants say this was erroneous, because it allowed recovery of derivative relief after the district court had granted the appellants'

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[4] *Sanek* addresses motions for directed verdict and for J.N.O.V., *see* 43 Ohio St. 3d at 172, 539 N.E.2d at 1117, which Rule 50 incorporates into the motion for judgment as a matter of law. *K & T Enters.*, 97 F.3d at 175 (citing *Black v. Ryder/P.I.E. Nationwide, Inc.*, 15 F.3d 573, 583 (6th Cir. 1994)).

summary judgment motion on the derivative claims. Citing *Griffin v. Michigan Dep't of Corrections*, 5 F.3d 186, 190 (6th Cir. 1993), they claim this violated the law of the case.

Appellants' reliance on *Griffin* is misplaced. There, we made it clear that the prior order that constituted the law of the case was a final order that the state had a duty to appeal timely. Here, the order of partial summary judgment, although the law of the case, was not final until the district court entered its judgment disposing of the entire case. However, that order, although not a final order for purposes of appeal at the time it was entered, nonetheless dismissed the derivative claims in the complaint, and became final when the district court entered the judgment from which defendants and plaintiff now appeal. Although he could have done so, the plaintiff does not challenge that order dismissing the derivative claims in this appeal.

The district court's order did not consider whether the plaintiff's claims were derivative; rather, the court assumed that they were derivative and dismissed them because the plaintiff was not properly representative of the other allegedly wronged shareholders. Although the plaintiff has not challenged that order, we think that to decide this appeal properly, we must consider whether the complaint raises derivative claims only or whether it has raised claims that the plaintiff may bring directly. We address first the misappropriation claims in Count I.

The general rule in Ohio is stated in *Adair v. Wozniak*, 23 Ohio St. 3d 174, 492 N.E.2d 426 (1986) (syllabus):

> [O]nly a corporation and not its shareholders can complain of an injury sustained by, or a wrong done

> to, the corporation. However, this general principle has no application where the wrongful acts are not only against the corporation but are also violations of a duty arising from contract or otherwise owed directly by the wrongdoer to the shareholder.

Id. at 176, 492 N.E.2d at 428 (internal citations omitted).

In *Crosby v. Beam*, 548 N.E.2d 217 (1989), the Ohio Supreme Court announced an exception to the general rule for actions brought by minority shareholders in close corporations. There, the court held that majority shareholders owe a fiduciary duty to minority shareholders, and where the majority shareholders use their control to prevent the minority from having equal opportunity in the corporation, and the minority shareholder is injured in a way that is separate and distinct from the injury to the corporation, the complaining shareholder has a direct, as opposed to a derivative, action. *Id.* at 108-110, 548 N.E.2d at 220-21. Subsequently, in *Weston v. Weston Paper & Mfg. Co.*, 74 Ohio St. 3d 377, 379-80, 658 N.E.2d 1058, 1060-61 (1996), the Ohio Supreme Court reaffirmed that the *Crosby* exception to the general rule was an exception peculiar to closely held corporations, and would not be extended to corporations not closely held.

The Ohio Supreme Court has not addressed the issue of direct versus derivative actions in the circumstances presented by the case before us. The essence of Palmer's claim is that LaValley, another minority shareholder in Fox Research, used his position as chairman of Fox Research to advance the interests of his own separate companies, to the detriment of Fox Research, and thus injured Palmer as a minority shareholder. The actions of which Palmer complains were not the actions of a majority or controlling shareholder

at all; neither did the actions complained of injure Palmer in a way that was separate and distinct from the injury to the corporation. To the contrary, Palmer specifically complains that LaValley injured Fox Research by taking from it opportunities that Palmer contends belonged to it, and by preventing the corporation from making profits. Those injuries were shared by all of the other shareholders, including LaValley, whose minority shares were diminished in value to the same extent as all other shares.

We note that at least one appellate court in Ohio has extended the *Crosby* rationale to apply to actions by a "controlling" shareholder who was not a majority shareholder. *See McLaughlin v. Beeghly*, 617 N.E.2d 703, 705-06 (1992). The facts in that case, however, are sufficiently different from those here, that we cannot conclude that the Ohio Supreme Court would extend *McLaughlin* to this case.[5]

We hold that Palmer's claims of misappropriation in Count I are wholly derivative. Having granted judgment to the defendants on the derivative claim prior to trial, the district court erred in permitting the jury to consider any evidence relative to that count, and the judgment as to Count I must be reversed.

The jury made no finding on the claims in Count II—unjust enrichment and constructive trust. But as the district court correctly noted in its order of February 4,

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[5] In *McLaughlin*, the evidence established that although the shares were equally held by three individuals, the "controlling" shareholder held voting rights of one of the others and "[t]o all intents and purposes, [he] controlled the voting power of [that other shareholder] as fully as if he actually owned those shares." 84 Ohio App.3d at 706, 617 N.E.2d. at 706.

1994, Count II raises no basis for recovery in addition to what the plaintiff asserted in Count I. Therefore, because the plaintiff may not recover on Count I, neither may he recover on Count II.

C. ATTORNEY MALPRACTICE

The appellants contend that the district court's grant of summary judgment on the derivative claims left Palmer with, at best, an individual claim for attorney malpractice. The appellants point out that Count III of the complaint, which alleged attorney malpractice, claims no injury to Palmer separate and distinct from that to the corporation, and that, in any event, Palmer failed to prove any such individual and non-derivative claim. For the reasons explained above, we agree that Palmer is not entitled to recover for acts of malpractice that resulted in injury to the corporation, and are therefore solely derivative claims. Because we think, however, that read broadly, Count III can be construed to allege a claim of separate injury to Palmer, in addition to the derivative claims, we review the record to determine whether Palmer presented sufficient evidence of attorney malpractice resulting in injury peculiar to him to sustain the jury's verdict.

The elements of legal malpractice in Ohio were stated early in this century. *See Jablonski v. Higgins*, 6 Ohio Misc. 2d 8, ____, 453 N.E.2d 1296, 1298 (Ohio Com. Pl. 1983) (citing *Long v. Bowersox*, 19 Ohio Dec. 494, 500-01, 8 Ohio N.P. (N.S.) 249, ____ (C.P. 1909)). As recently stated, the elements are "(1) an attorney-client relationship giving rise to a duty, (2) a breach of that duty, and (3) damages proximately caused by the breach." *State ex rel. Sellers v. Gerken*, 72 Ohio St. 3d 115, 117, 647 N.E.2d 807,

810 (1995) (citing *Krahn v. Kinney*, 43 Ohio St. 3d 103, 105, 538 N.E.2d 1058, 1060 (1989)).

Palmer points first to the fact that LaValley had for many years been the attorney for Palmer in all of his personal, business and family affairs, claiming that under those circumstances, he "felt and expected" that LaValley was acting as his attorney with respect to Fox Research matters as well. However, the reasonableness of that expectation is undermined by the fact that in the offering circular LaValley sent to prospective investors in Fox Research, including Palmer, LaValley identified himself as counsel for the corporation. Further, as the appellants point out, Palmer himself states in his brief that the damages he claims as a result of the alleged acts of malpractice "were what Fox Research should have obtained and ultimately paid *pro rata* to Palmer—but did not obtain or pay to him because of LaValley's wrongdoing." The fact that Palmer claims only his *pro rata* share of those damages does not change the character of his claim. The injury claimed was to the corporation.

We have reviewed the voluminous record in this case, and conclude, albeit reluctantly, that the evidence of attorney malpractice presented by Palmer falls short of meeting the requirements for establishing an attorney malpractice claim resulting in injury to Palmer individually. We do not, by this conclusion, condone the conduct of LaValley, which we think the jury disapproved of with good cause. However, because the evidence supports only derivative claims of injury as a result of LaValley's actions, we hold that the judgment on Count III must be reversed.

III. CONCLUSION

We REVERSE the judgment of the district court and REMAND this action with instructions to enter judgment for the appellants.

APPENDIX B

Nos. 94-3994/4009
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DELOS M. PALMER,	) Filed April 7, 1997
	) Leonard Green,
Plaintiff-Appellee/Cross-Appellant,	) Clerk
	)
v.	) ORDER
	)
FOX SOFTWARE, INC., ET AL.,	)
	)
Defendants,	)
	)
RICHARD G. LAVALLEY, SR., ET AL.,	)
	)
Defendants-Appellants/Cross-Appellees.	)

BEFORE: JONES, BOGGS, and BATCHELDER, Circuit Judges

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green/lh

Leonard Green, Clerk

APPENDIX C

Nos. 94-3994/4009
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DELOS M. PALMER, individually and as shareholder for the benefit of Fox Research, Inc.,	)	Filed December 15, 1994 Leonard Green, Clerk
Plaintiff/Appellee Cross-Appellant,	)	
v.	)	ORDER
FOX SOFTWARE, INC., et al.,	)	
Defendants	)	
RICHARD G. LAVALLEY, SR.; GERARD ASSOCIATES, INC.,	)	
Defendants/Appellants Cross-Appellees.	)	

Before: BROWN, RYAN and BOGGS, Circuit Judges.

Two of the defendants appeal the judgment in favor of the plaintiff in this diversity action brought by a shareholder of a closely held corporation alleging various claims that defendants breached corporate duties. The plaintiff cross-appeals from the limitation on prejudgment interest and the denial of attorneys' fees and punitive damages. The

defendants move to certify a question of law to the Ohio Supreme Court. The plaintiff opposes the motion. The defendants also seek to stay the appeal pending the Ohio court's resolution of the issue.

The Ohio Supreme Court has indicated by rule that it may exercise its discretion to decide a certified question when the certifying court determines that "in a proceeding before it, there are questions of law of this state which may be determinative of the cause and as to which it appears . . . that there is no controlling precedent . . . ." Rule 16, Section 1, Ohio Supreme Court Rules. On review of the motion, the response in opposition, and the reply in support, we cannot conclude that certification of the question of law is necessary to save judicial resources or to resolve the appeals before this court. However, the panel which is assigned this appeal for final disposition on the merits may view the matter differently after reviewing the record and briefs.

Therefore, it is **ORDERED** that the motion to certify the question of law is referred to the panel that will decide this case on its merits. The request for a stay is denied.

ENTERED BY ORDER OF THE COURT
/s/ Leonard Green/js
Clerk

APPENDIX D

JURY VERDICT FORM

SINGLE INJURY

If you find a single injury from all acts, such that damages cannot be divided among the defendants, you may make one award.

Do you find that any injury was a single injury?

✓	
Yes	No

If yes, amount: $ 22,000,000

If you did not find a single injury, go to the separate counts below. If you did find a single injury, do not go to separate counts below.

COUNTS I AND II

On Palmer's claims under Counts I and II against LaValley, Sr. we find for:

Palmer _____ LaValley, Sr. _____

If for Palmer, amount: $_____

On Palmer's claims under Counts I and II against Fulton we find for:

Palmer _____ Fulton _____

If for Palmer, amount: $_____

COUNT III

On Palmer's claim under Count III against LaValley, Sr., we find for:

Palmer _____ LaValley, Sr. _____

If for Palmer, amount: $_____

On Palmer's claim under Count III against LaValley, Jr. we find for:

Palmer _____ LaValley, Jr. _____

If for Palmer, amount: $_____

WE, THE JURY, HAVE UNANIMOUSLY AGREED UPON AND TOGETHER GIVE THE ANSWERS STATED TO THE FOREGOING QUESTIONS.

May 4, 1994 /s/ Joseph N. Moran
Foreperson of the Jury

COUNTS I AND II

1. Do you find that LaValley, Sr. performed his duties in good faith and in a manner he reasonably believed to be in the best interests of Fox Research, Inc. and its shareholders?

Yes	No
	✓

1A. If the answer is No. 1 is no, do you find that Palmer was damaged as a result?

Yes	No
✓	

2. Do you find that Fulton performed his duties in good faith and in a manner he reasonably believed to be in the best interests of Fox Research, Inc. and its shareholders?

Yes	No
	✓

2A. If the answer to No. 2 is no, do you find that Palmer was damaged as a result?

Yes	No
✓	

3. Do you find that LaValley, Sr. engaged in self-dealing?

Yes	No
✓	

4. If the answer is No. 3 is yes, do you find that the material facts as to LaValley, Sr.'s relationship or interest and as to the contract or transaction were disclosed or were known to the shareholders and the contract or transaction was specifically approved at a meeting of the shareholders held for such purpose by a vote of the majority of the shareholders not interested in the contract or transaction?

Yes	No
	✓

4A. If the answer to No. 4 is no, do you find that Palmer was damaged as a result?

Yes	No
✓	

5. Do you find that Fulton engaged in self-dealing?

Yes	No
✓	

6. If the answer to No. 5 is yes, do you find that the material facts as to Fulton's relationship or interest and as to the contract or transaction were disclosed or were known to the shareholders and the contract or transaction was specifically approved at a meeting of the shareholders held for such purpose by a vote of the majority of the shareholders not interested in the contract or transaction?

Yes	No
	✓

6A. If the answer to No. 6 is no, do you find that Palmer was damaged as a result?

✓	
Yes	No

7. Do you find that LaValley, Sr. while in his capacity as officer, director and/or controlling shareholder of Fox Research, Inc. acquired knowledge and information about a possible investment or business opportunity in Fox Research's line of business, or advantageous to Fox Research?

✓	
Yes	No

8. If the answer to No. 7 is yes, do you find that Fox Research had the financial ability to make the investment?

✓	
Yes	No

9. If the answer to No. 8 is no, do you find that LaValley, Sr. made no effort to cure the inability or that his misconduct was responsible for it?

Yes	No

9A. If the answer to No. 8 is yes, or if the answer to No. 9 is yes, do you find that Palmer was damaged as a result?

✓	
Yes	No

10. Do you find that Fulton while in his capacity as an officer of Fox Research, Inc. acquired knowledge and information about a possible investment or business opportunity in Fox Research's line of business, or advantageous to Fox Research?

✓	
Yes	No

11. If the answer to No. 10 is yes, do you find that Fox Research had the financial ability to make the investment?

✓	
Yes	No

12. If the answer to No. 11 is no, do you find that Fulton made no effort to cure the inability or that his misconduct was responsible for it?

Yes	No

13. If the answer to No. 11 is yes, or if the answer to No. 12 is yes, do you find that Palmer was damaged as a result?

✓	
Yes	No

14. Was Palmer entitled to a 1/7 or a 1/9 interest in Fox Research, Inc.?

✓	
1/7	1/9

15. Do you find that LaValley, Sr., as officer, director, and/or controlling shareholder of Fox Research, Inc. failed to keep correct and complete corporate books, records, and minutes?

✓	
Yes	No

15A. If the answer to No. 15 is yes, do you find that Palmer was damaged as a result?

✓	
Yes	No

16. Do you find that LaValley, Sr. as officer, director and/or controlling shareholder of Fox Research, Inc. made an entry or entries in the corporate books, records, and minutes, with intent to deceive and knowing it to be false?

✓	
Yes	No

16A. If the answer to No. 16 is yes, do you find that Palmer was damaged as a result?

✓	
Yes	No

17. Do you find that LaValley, Sr., as officer, director and/or controlling shareholder, failed to hold annual meetings of Fox Research, Inc. as required by law?

✓	
Yes	No

17A. If the answer to No. 17 is yes, do you find that Palmer was damaged as a result?

✓	
Yes	No

18. Do you find that Fulton was obligated to make an assignment of copyrights to Fox Research?

✓	
Yes	No

19. Did Palmer breach his duty as a director of Fox Research, Inc. to keep informed of the affairs of Fox Research, Inc. with the care that an ordinarily prudent person would use under similar circumstances?

✓	
Yes	No

20. Do you find that, on or before June 23, 1988, Palmer knew, or should have known, about the injuries he claims and their cause?

	✓
Yes	No

21. If yes, then do you find that Palmer reasonably relied in good faith, to his detriment, on a misrepresentation of fact by LaValley, Sr. or someone who has close ties to him and thereby failed to file his complaint?

Yes	No

22. If the answer to No. 20 is yes, do you find that Palmer reasonably relied in good faith, to his detriment, on a misrepresentation of fact by Fulton or someone ~~who~~ has close ties to him and thereby failed to file his complaint?

Yes	No

23. If you have found that any defendant committed misconduct with respect to the affairs of Fox Research, Inc. then do you find that any of the defendants fraudulently concealed such misconduct from Palmer?

Yes	No
✓	

COUNT III

24. Do you find that Palmer had an attorney-client relationship with LaValley, Sr. with respect to his investment in Fox Research?

Yes	No
✓	

25. If the answer to No. 24 is yes, do you find that LaValley, Sr. breached a duty to provide competent legal services with respect to his investment in Fox Research?

Yes	No
✓	

26. If the answer to No. 25 is yes, do you find that LaValley, Sr.'s misconduct as an attorney proximately caused injury to Palmer?

✓	
Yes	No

27. Do you find that Palmer had an attorney-client relationship with LaValley, Jr. with respect to his investment in Fox Research?

	✓
Yes	No

28. If the answer to No. 27 is yes, do you find that LaValley, Jr. breached a duty to provide competent legal services with respect to Palmer's investment in Fox Research?

Yes	No

29. If the answer to No. 28 is yes, do you find that LaValley, Jr.'s misconduct as an attorney proximately caused injury to Palmer?

Yes	No

COUNTS I, II AND III

30. Do you find that LaValley, Sr. acted with malice toward Palmer? *Regarding extremely reckless behavior only*[1]

✓	
Yes	No

31. Do you find that Fulton acted with malice toward Palmer? *Regarding extremely reckless behavior only*

✓	
Yes	No

32. Do you find that LaValley, Jr. acted with malice toward Palmer? *Regarding extremely reckless behavior only*

✓	
Yes	No

WE, THE JURY, HAVE UNANIMOUSLY AGREED UPON AND TOGETHER GIVE THE ANSWERS STATED TO THE FOREGOING QUESTIONS.

May 4, 1994 /s/ Joseph N. Moran
Foreperson of the Jury

[1] Italicized matter was written in by the jurors.

APPENDIX E

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

DELOS M. PALMER, JR.,
individually and as
Shareholder for the benefit
of FOX RESEARCH, INC.,
Plaintiff,

vs

CASE NO. 3:92-CV-7339
HON. LAWRENCE P. ZATKOFF

FOX SOFTWARE, INC.,
FOX HOLDINGS, INC.,
RICHARD G. LAVALLEY, SR.,
RICHARD G. LAVALLEY, JR.,
GERARD ASSOCIATES, INC.,
DAVID A. FULTON, and
FULTON ASSOCIATES, INC.,
Defendants.

OPINION AND ORDER

The following motions are before this Court: (1) defendants' post-trial motion No. 1 for judgment as a matter of law on counts I and II based on the statute of limitations; (2) defendants' post-trial motion No. 2 for judgment as a matter of law on counts I and II because FoxBASE+, FoxBASE+/Mac, FoxPro, FoxGraph, and the FoxPro Library Kit were not corporate opportunities of Fox Research; (3) defendants' post-trial motion No. 3 for a judgment as a matter of law on counts I and II based on the

summary judgment rule in view of the June 12, 1992 special meeting of the independent shareholders; (4) defendants' post-trial motion for judgment on counts I and II based on the legal question of plaintiff's lack of standing to bring (a) individual claims for corporate injury and (b) a claim against Fulton because of his lack of control; (5) defendants' post-trial motion for judgment as a matter of law on count III because LaValley Sr. had no attorney-client relationship with plaintiff with respect to Fox Research Investments; (6) defendants' post-trial motion for new trial or, in the alternative, for remittitur; (7) defendants' post-trial motion for a new damages trial on the ground that the damages awarded were not supported by the evidence; (8) defendants' motion that the jury's finding of malice in interrogatory numbers 30-32 is contrary to law; (9) defendants' motion to alter or amend the judgment to exclude Fulton Associates and Gerard Associates from liability; (10) defendants' motion to alter or amend the judgment under Rule 59(e) because, with respect to count III, plaintiff failed to introduce expert testimony of malpractice; (11) defendants LaValley Sr.'s and Gerard Associates' motion to amend judgment; (12) plaintiff's motion to strike post-trial motions 8-11 set-forth above; and (13) plaintiff's motion for punitive damages and attorney fees. The parties filed their respective briefs in opposition to these motions, as well as the briefs in reply. In addition, defendant LaValley Sr. and defendant Gerard Associates filed a "separate supplemental reply memorandum in support of defendants' post-trial motion No. 1 for judgment as a matter of law on counts I and II based on the statute of limitations and plaintiff has moved to have this supplemental pleading stricken.

On Thursday, August 11, 1994, this Court entertained oral arguments on defendants' post-trial motion for

new trial or, in the alternative, for remittitur and defendants' post-trial motion for a new damages trial on the ground that the damages awarded were not supported by the evidence. The parties to this action have thoroughly briefed all of the issues raised in every motion currently before this Court.

For the reasons set forth in the briefs in opposition, the following motions are DENIED: (1) defendants' post-trial motion No. 1 for judgment as a matter of law on counts I and II based on the statute of limitations; (2) defendants' post-trial motion No. 2 for judgment as a matter of law on counts I and II because FoxBASE+, FoxBASE+/Mac, FoxPro, FoxGraph, and the FoxPro Library Kit were not corporate opportunities of Fox Research; (3) defendants' post-trial motion No. 3 for a judgment as a matter of law on counts I and II based on the summary judgment rule in view of the June 12, 1992 special meeting of the independent shareholders; (4) defendants' post-trial motion for judgment on counts I and II based on the legal question of plaintiff's lack of standing to bring (a) individual claims for corporate injury and (b) a claim against Fulton because of his lack of control; (5) defendants' post-trial motion for judgment as a matter of law on count III because LaValley Sr. had no attorney-client relationship with plaintiff with respect to Fox Research Investments; (6) defendants' motion that the jury's finding of malice in interrogatory numbers 30-32 is contrary to law; (7) defendants' motion to alter or amend the judgment to exclude Fulton Associates and Gerard Associates from liability; (8) defendants' motion to alter or amend the judgment under Rule 59(e) because, with respect to count III, plaintiff failed to introduce expert testimony of malpractice; (9) defendants LaValley Sr.'s and Gerard Associates' motion to amend judgment; (10) defendants' motion for a new trial on both liability and damages; (11) plaintiff's mo-

tion to strike post-trial motions 8-11 set-forth above; (12) plaintiff's motion for punitive damages and attorney fees;[1] and (13) plaintiffs' motion to strike defendants LaValley Sr.'s and Gerard Associates' supplemental reply brief.

For the reasons set forth below, this Court shall also deny defendant's motion for a new damages trial. However, this denial is conditioned upon plaintiff filing a remittitur in the amount of $8,328,545 and thus having judgment in the amount of $13,671.455 [*sic*]. If plaintiff elects not to file a remittitur in this amount, then this Court will grant defendants' motion for a new trial on damages. This new damages trial shall not include, however, a retrial on the issue of punitive damages, which this Court has already denied in this case.

In reviewing defendants' motion for a new trial on damages, this Court may compare opposing proofs and weigh the evidence. Moran v. Manville Sales Corp., 691 F.2d 811, 816 (6th Cir. 1982).. It is the duty of this Court to set aside a verdict and grant a new trial on damages if this Court concludes that the verdict is against the clear weight of the evidence, even if a judgment as a matter of law is not warranted. Bruner v. Dunaway, 684 F.2d 422, 425 (6th Cir. 1982).

The difficulty with the jury verdict in this case is that it is based on plaintiff's damage expert's contention that Fox Software was only worth $34.7 million. Plaintiff's damage expert arrived at this conclusion, notwithstanding the fact

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[1] With respect to plaintiff's motion for punitive damages, this Court announced its decision during oral argument on August 11, 1994.

that Microsoft, in an arms-length [*sic*] transaction valued and purchased Fox Software for $80 million. Micorsoft's [*sic*] valuation of Fox Software was not challenged by plaintiff's damage expert, except for arguing that he need not be bound by the valuation which was contained in the merger documents. Defendant's damage expert did corroborate Microsoft's valuation.

Furthermore, the record supports the $80 million valuation of Fox Software. Fox Software owned all of the technology underlying the products at issue in this case. In addition, Sheilah Fulton, defendant Fulton's ex-wife, owned 25% of Fox Software and she received approximately $20 million in the Microsoft merger proceeds, which, represents her 25% ownership in Fox Software. As defendants note in the reply brief, "[t]he higher the value of Fox Software, the more stock Sheilah would receive. Accordingly, LaValley and Fulton had an incentive to minimize the value of Fox Software." Reply at 6. Finally, and very important in this Court's considered opinion, the development team for these programs was at Fox Software. Micorsoft [*sic*] wanted the entire development team, and indeed, the development team, after the merger, went to work for Microsoft. This Court finds that plaintiff's damage expert's assumption that Fox Software had a value of $34.7 million is against the great weight of the evidence. Thus, defendants are entitled to a new trial on the issue of damages. However, as noted above, this Court will deny defendants' motion for a new [*sic*] on damages if plaintiff agrees to remit a portion of the verdict.

> "A motion for remittitur should only be granted if the award clearly exceeds the amount which, under the evidence in the case, was the maximum that the

> jury reasonably could find to be compensatory for the plaintiff's loss."

In re Lewis, 845 F.2d 624, 635 (6th Cir. 1988) (citations omitted) (internal quotation marks omitted) (emphasis added by this Lewis Court). Here, based on the evidence adduced at trial, this Court finds that the maximum the jury reasonably could find to compensate plaintiff for his loss is $13,671.455 [*sic*].

This amount is reached based on the following. First, defendants have not challenged[2] the amount of $3.9 million in damages for royalties never paid and $600,000 in prejudgment interest. Second, the only conclusion supportable by the evidence at trial is that Fox Software and Fox Holdings each had a value of $80 million. Thus, plaintiff would be entitled to a 1/7 share of the $80 million in the merger proceeds which went to Fox Holdings. This amounts to $11,428,571. Plaintiff's damage expert asserted that plaintiff should have received $19,757,166 in the form of merger proceeds. Consequently, there is a difference of $8,328,545 between the highest amount which a jury reasonably could have awarded plaintiff in compensatory damages and the amount actually awarded by the jury in this case.[3] Therefore, if plaintiff remits $8,328,545 and accepts

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[2] Defendants have challenged this portion of the damages on various grounds which relate only to the issue of liability. However, this Court has denied all of these post-trial motions.

[3] This Court is cognizant of the fact that if one takes the merger proceeds of $11,428,571, the outstanding royalty payments of $3,900,000, and the prejudgment interest of $600,000, the total amounts to $15,928,571. Therefore, it could be argued that the highest amount which a jury could have reasonably awarded plaintiff in this case is $15,928,571, rather then [*sic*] the amount of $13,671,455, which this

a judgment in the amount of $13,671,455 which this Court would entered [*sic*] nunc pro tunc, June 6, 1994, this Court will deny defendants' motion for a new trial on damages. Plaintiff shall have 15 days from the date this Opinion and Order is issued—not from the date it is entered—in which to inform this Court in writing whether he will remit this amount.

IT IS SO ORDERED. /s/ L.P. Zatkoff
LAWRENCE P. ZATKOFF
UNITED STATES DISTRICT JUDGE
Dated: August 17, 1994

Court has determined to be the highest amount a jury could have reasonably awarded plaintiff. Certainly, this Court recognizes that plaintiff would have been reasonable in seeking the jury to return a verdict in the amount of $15,928,571.

However, the issue before this Court is what is the maximum amount which a jury could have reasonably award plaintiff in this case and not what is the maximum amount a reasonable plaintiff could seek to have the jury award. Plaintiff sought the jury to return a verdict in the amount of $24,300,000. The jury, finding in favor of plaintiff, returned a verdict in the amount of $22,000,000. As a consequence, this Court believes it is proper to subtract the $8,328,545 from the $22,000,000 jury verdict in this case.